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NO. 98-1282

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1998

FRANKS & SON, INC., on behalf of themselves and all others similarly situated,

Petitioners,

v.

THE STATE OF WASHINGTON, WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, AND OFFICE OF THE STATE TREASURER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state regulatory fee charged to motor carriers violates the Commerce Clause when the fee (1) is used only for regulating such carriers, (2) is based on a fair approximation of the costs to the state of such regulation, and (3) does not discriminate against interstate commerce.

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INTRODUCTION

The Petitioner asks this Court to declare unconstitutional as violative of the Commerce Clause a Washington regulatory fee which was repealed in 1993.[1] The proceeds of that fee were used by the Washington Utilities and Transportation Commission (WUTC or Commission) only in its motor carrier regulatory program, primarily for the enforcement of state and federal safety regulations. Because the fee was not discriminatory and was based on a fair approximation of the services provided by the state, it is valid, and the Court should deny the Petition for a Writ of Certiorari (Petition). The judgment below is not inconsistent with existing Supreme Court case law; there is no substantial split of authority on the question presented in state supreme courts and federal courts of appeal; and, in any event, the issue presented is not a substantial one warranting review by this Court in the context of this case.

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[1] The regulatory fee at issue in this case was imposed by former Wash. Rev. Code § 81.80.320 (1993), Wash. Laws 1971, ex. sess., ch. 143, §5, which is reproduced in the Appendix at 1a-2a. It was repealed effective January 1, 1994. Wash. Laws 1993, chapter 97, § 7. It was repealed because of the enactment of the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (Dec. 18, 1991). That Act authorized the then Interstate Commerce Commission to create a base state registration system for interstate carriers and allowed each state to impose a fee in lieu of a registration fee, not to exceed that amount earlier charged (in Washington's case, $10). That fee was collected by the carriers' base state and then transmitted to each state actually imposing such registration fees. The Congressional decision that each state could not register all carriers doing business in that state made it administratively difficult to impose any additional regulatory fee over and above the base state fee. This led to a revised funding method, relying more on fees from intrastate carriers. *See Franks & Son, Inc. v. State*, 136 Wn.2d 737, 745, 966 P.2d 1232, 1236 (1998), Petition Appendix (Petition App.) at 6a.

STATEMENT

A. The Nature and Purpose of the Regulatory Fee

Until the fee's repeal in 1993, the WUTC funded its motor carrier regulatory program with a regulatory fee imposed on carriers operating in Washington, whether engaged in intrastate commerce or interstate commerce. The fee was used only for regulatory purposes primarily to fund the state's motor carrier safety program. The WUTC enforced various safety rules (both state and federal) including rules on equipment, drivers' hours of service, and driver drug and alcohol use prohibitions.[2] No entity other than the carriers paying the fees received any services funded by the fee.

As a part of that program, all vehicles entering the state at a port of entry[3] were given at least a cursory inspection. If a potential problem was observed or suspected, a WUTC inspector conducted a more extensive inspection. These inspections ranged from a 10 minute inspection of the driver's license and recorded hours of service to a 30 to 40 minute inspection of brakes, steering, lights, and other safety equipment.[4] Approximately 10 to 15 percent of the vehicles entering the state were subject to such an additional inspection. In addition, inspections were conducted at weigh stations throughout the state, at other spots along federal and state highways, along city and county roads, and at the carriers' terminals.[5]

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[2] *See* Wash. Admin. Code §§ 480-12-165 to -190 (1997). Wash. Admin. Code § 480-12-180(6) incorporated by reference various federal rules in 49 C.F.R. pts. 382-83, 391.

[3] There were five staffed ports of entry near state borders along major highways into the state. Clerk's Papers at 1276. This evidence, and much of the other evidence presented to the courts below, consisted of affidavits of persons familiar with in the safety inspection program during the period in question. This evidence, like virtually all of the evidence in this case, was not refuted by the Petitioner and its co-plaintiff below.

[4] Clerk's Papers at 1276-77.

[5] Clerk's Papers at 1277.

These inspections revealed a substantial number of violations of state and federal law, particularly by interstate carriers. For example, in one typical 48-hour inspection at the weigh stations along a major interstate highway in central Washington, 6,339 trucks crossed the scales, 1,201 were stopped and inspected, and 90 citations were issued. Eighty-four were issued to interstate carriers, two to carriers having intrastate authority, and four to carriers having no authority whatsoever.[6] Indeed, the Petitioner and its co-plaintiff below themselves "have each been cited for numerous violations of state safety rules." 136 Wn.2d at 757, 966 P.2d at 1252, Petition App. at 19a.

The Washington Supreme Court summarized:

> "During the time the regulatory fee was in place, the State of Washington had one of the better safety records in the nation, due, in part, to an exemplary inspection program by the UTC. The motor carrier safety program proved effective in reducing truck accidents as well as keeping illegal carriers from driving. The regulatory fee funded those efforts." *Id.*

The relatively high incidence of citations to interstate carriers (members of the plaintiff class[7]) versus those issued to intrastate carriers (non-class members) is consistent with the "significant differences in the regulatory burdens placed on the state by the two classes of vehicles."[8] This difference may be explained in part by the fact that 95 percent of all the carriers are in the plaintiff class. 136 Wn.2d at 751, 966 P.2d at 1293, Petition App. at 13a. The remaining five percent constituting the non-class carriers are generally smaller,

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[6] Clerk's Papers at 1278.

[7] The superior court certified this case as a class action, with the plaintiff class consisting of all carriers operating at least, in part, in interstate commerce.

[8] App. at 11a. This was the unrefuted testimony of Larry A. Pursley, the Executive Vice President of the Washington Truckers Associations (WTA), which represents both interstate and intrastate motor carriers in Washington. Clerk's Papers at 1245-51. His testimony is included in the Appendix at 7a to 13a. The WTA supported the state below and filed a brief *amicus curiae* in the superior court.

travel fewer overall miles, make frequent stops, and carry different types of cargo.[9]

Based on this record, the Washington Supreme Court found that the plaintiff class posed special additional problems and burdens not posed by the intrastate carriers.

> "It is worth noting that Plaintiff carriers pose significant safety concerns not posed by carriers which operate solely in state. For example, Plaintiff carriers are typically away from their bases for two to three weeks at a time, precluding service and maintenance from being performed on their vehicles. Intrastate carriers, on the other hand, are generally back at their bases each night, and as a result are closer to and more likely to avail themselves of maintenance facilities. Another significant safety consideration is the fact that class carriers are paid on a mileage basis, which provides a powerful economic incentive to drive longer hours at a higher speed. Intrastate carriers, on the other hand, are not paid on a mileage basis." 136 Wn.2d at 756, 966 P.2d at 1242, Petition App. at 18a-19a.

The fee to fund this program was set generally on a per-vehicle basis, the exact amount dependent upon the size of the vehicle. However, for vehicles traveling in interstate eommerce, the WUTC was authorized to establish a "reduced schedule of fees for short term operations."[10] The

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[9] See App. at 9a-11a. Note that this class configuration is different from that in *American Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987)*. In *Scheiner*, the plaintiff class consisted of interstate carriers based outside Pennsylvania. They were compared to the "non-class" consisting of interstate carriers based in Pennsylvania. However, here, the plaintiffs were all interstate carriers, wherever based. In the "non-class" are the relatively few carriers which operate only in intrastate commerce.

[10] Former Wash. Rev. Code § 81.80.300 stated in part:

> "The commission may adopt rules and regulations imposing a reduced schedule of fees for short term operations, requiring reports of carriers, and imposing such conditions as the public interest may require with respect to the operation of such vehicles."

Commission so authorized various options for such interstate carriers. *See* 136 Wn.2d at 757-58, 966 P.2d at 1242, Petition App. at 20a.[11] For example, an interstate carrier sending a vehicle into Washington just one time did not have to pay the full per-vehicle fee. Instead, it could purchase a single trip permit for $10. Likewise, if the carrier had many vehicles, some of which would travel to Washington, but it did not know which ones, it could simply purchase "floater cards" at a reduced rate which could be passed from vehicle to vehicle.[12]

The fee was used only for regulatory purposes, predominantly the motor carrier safety program, and the Commission was directed to reduce the fees accordingly to fit its regulatory budget.[13] The statutory amount of $48 was a maximum only. Every year the Commission evaluated the forecasted revenues from the fee and the level of expenditures set by the legislature and reduced the statutory maximum to that level required for regulation and no more.[14] If in a given year there was a surplus or deficit in the motor carrier account, the level of the fee was adjusted in the future. Because of this, the fee for the larger vehicles ranged from $29 to $34 during the years in question. Therefore, as a matter of law and practice, the fee revenues were not diverted to the state general fund for any non-regulatory purpose.[15]

See also Former Wash. Rev. Code §81.80.318, Wash. Laws 1985, chapter 7, § 153, App. at 1a.

[11] Former Wash. Admin. Code §480-12-130(3)(b) (1993), App. at 3a-5a.

[12] The Petitioner and its co-plaintiff below did not take advantage of these options. Instead, they simply paid the full amount of the per-vehicle fee. The record reflects for one year during the period for which refunds are requested Petitioner paid more in fees than it was required to on 120 of 146 of its vehicles entering Washington. *See* Br. of Respondents and Cross-Appellants at 23, n.34.

[13] Former Wash. Rev. Code 81.80.320, App. at 1a-2a.

[14] Petitioner's recital that the fee was $48, Petition at 2, therefore is not correct. At no time did the WUTC assess a $48 fee.

[15] Petitioner notes that the fee proceeds were used for economic regulation of intrastate transportation as well as for the motor carrier

B. Procedure Below

The Petitioner and its co-plaintiff below filed this class action alleging three substantive claims.[16] First, they alleged that the fee violated the commerce clause, stating in their complaint:

> "The Regulatory Fee imposes an unappropriated,[17] flat tax on Carriers unrelated to the actual miles a Carrier's motive power vehicles travel in Washington. The Regulatory Fee, therefore, imposes, on average, a higher cost per mile traveled in Washington on the motive power vehicles of Plaintiffs and all members of the Plaintiffs' class that are not operated wholly within Washington than on the motive power vehicles of motor common or contract carriers that are operated wholly within Washington." Complaint at 7; Clerk's Papers at 13.

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safety program of both interstate and intrastate carriers. Petition at 17-18, n.13. This is true. However, if Petitioner is suggesting that the interstate carriers subsidized the overall regulation of the intrastate carriers, that is wrong for at least two reasons. First, Petitioner fails to point out that, according to one estimate, there were 3.5 times as many class carriers subject to intrastate economic regulation as non-class carriers, Clerk's Papers at 862, so the "benefits" of the economic regulatory program were not all attributable to the non-class carriers. Second, even assuming the non-class intrastate carriers did impose some burdens on the state not imposed by some class carriers, it is also true, and undisputed, that class carriers imposed special safety regulatory burdens on the state not imposed by non-class carriers. See note 8; App. at 11a. If there was an overall subsidy, the Petitioner and its co-plaintiff had the burden to so demonstrate. As the superior court below determined, they never made such a showing. Petition App. at 42a.

[16] Below, the plaintiff class was represented by two class representatives, Franks & Son, Inc., and Coast Express, Inc. For unexplained reasons, Coast Express is no longer participating in this case. The Order granting class certification appointed both as class representatives. Clerks' Papers at 333-34. Whether this matter remains appropriate for a class action would be an issue should there ultimately be a remand.

[17] The plaintiffs likely intended to allege that the Regulatory Fee was "unapportioned."

Second, the plaintiffs alleged that the regulatory fee was preempted by the Interstate Commerce Act, 49 U.S.C. § 11506,[18] and its implementing regulations. The Washington Supreme Court held that the regulatory fee was not so preempted, and the Petitioner here has not sought review of that holding. Finally, the plaintiffs alleged that the regulatory fee violated 42 U.S.C. § 1983. This claim was dismissed by stipulation of the parties.

In 1990, plaintiffs sought a preliminary injunction against continued collection of the fee arguing that because refunds would be uncertain, injunctive relief was necessary.[19] The superior court, noting that the fee payments were "questionably refundable" nevertheless denied the request for an injunction, finding that "[t]here is no evidence on the question of whether the fees charged by vehicle are related to the cost of inspection per-vehicle" and that "the plaintiff does have the burden to go forth in producing evidence to show the discriminatory nature of the tax." Therefore, the court could not find that the plaintiffs were likely to prevail on the merits. Petition App. at 52a-53a. The court urged the plaintiffs to set the matter for trial before the next round of fees came due. *Id.* at 54a.

Instead, the plaintiffs filed a motion for summary judgment, as did the state. The superior court denied both motions, again noting the plaintiffs' lack of evidence, stating:

> "[T]hose challenging the regulatory fee through commerce clause analysis have the burden of proving factual unfairness of the tax burden's [e]ffect on interstate commerce. Basically, Plaintiffs still have offered no admissible evidence on the issue." Petition App. at 47a.

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[18] This provision was repealed and recodified at 49 U.S.C. § 14504 by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803.

[19] In Plaintiffs' Brief in Support of Motion for Preliminary Injunction Escrowing Fee Proceeds, Clerk's Papers at 43, the plaintiffs stated that "[t]here is a clear risk that here, too, Plaintiffs and the members of Plaintiffs' class may be denied refunds because of a claim of state sovereign immunity or prospective-only application."

After further discovery, and a second round of cross motions for summary judgment, the superior court ruled that although the fee was not discriminatory,[20] and the fee was not shown to be "disproportionate to the benefit/burden of the [plaintiff carriers'] presence in Washington,"[21] it nevertheless violated the Commerce Clause because, under the test for a state tax set forth in *Complete Auto Transit, Inc.*

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[20] Ultimately, before the superior court, the plaintiffs attempted to prove discrimination as did the plaintiffs in *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987), by comparing the fees paid per mile traveled by class carriers with the fees paid per mile traveled by non-class carriers. They attempted this with an affidavit of plaintiffs' counsel who took some mileage and fee data obtained through discovery, made some assumptions, and made a calculation. Clerk's Papers at 1181-83. The state's expert replaced the assumptions with facts, incorporated them into plaintiffs' analysis, and concluded that the fees paid per mile by class carriers were not dramatically different from the fees paid per mile by non-class carriers. Clerk's Papers at 1252-61. While the superior court characterized the fee-per-mile issue as disputed, it nevertheless determined that the fee was not discriminatory because the mileage analysis was conducted on the false premise that miles traveled was a valid measure of the burdens placed on the state by the carriers. The superior court stated:

> "In *American Trucking Ass'n v. Scheiner*, . . . miles traveled was a reasonable measure of the burdens for which the fee was intended to compensate (highway wear and tear). For purposes of a discrimination analysis, the regulatory fee must be considered in relation to that which is a fair measure of the benefit conferred or burden borne.
>
> "After considering the materials for the renewed motions, I am not satisfied that mileage is a fair measure as Plaintiffs' urge. Defendant's argument and supporting materials . . . suggest that highway safety has unique burdens imposed by interstate carriers. . . . *These factual claims are not refuted by Plaintiffs.*" Petition App. at 41a-42a (emphasis added).

[21] Petition App. at 39a. The plaintiffs have the "burden of proving the fees constitutionally excessive in relation to costs." *New Hampshire Motor Transport Ass'n v. Flynn*, 751 F.2d 43, 47 (1st Cir. 1984) (Breyer, J.).

v. Brady, 430 U.S. 274 (1977), it was not "internally consistent." Petition App. at 44a. However, the superior court nevertheless entered judgment for the state on the ground that the plaintiffs were not entitled to a refund. Petition App. at 39a.

On appeal, the Washington Supreme Court reversed, noting that the plaintiffs did not appeal the superior court determination that the fee was not discriminatory. 136 Wn.2d at 748, 966 P.2d at 1238, Petition App. at 10a.[22] The Court distinguished the regulatory fee from a tax and held the fee constituted an appropriate exercise of the state's regulatory power. Citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the Washington Court held that the fee was evenhanded, did not discriminate against interstate commerce, served a legitimate local purpose, and did not place an undue burden on interstate commerce. 136 Wn.2d at 754-57, 966 P.2d at 1241-42, Petition App. at 16a-19a.

This Petition followed.

REASONS WHY THE PETITION SHOULD BE DENIED

A. The Challenged Regulatory Fee Is Not a "Tax"

Petitioner inappropriately attempts to import negative Commerce Clause analysis from tax cases into this case. As it argued below, Petitioner asks this Court to apply its decisions in *Complete Auto Transit v. Brady*, 430 U.S. 274,

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[22] Petitioner argues that the Washington Supreme Court erred in this characterization, citing its presentation to the superior court and argument to the Washington Supreme Court as creating a dispute of fact. Petition at 11-13, n.8. However, in the passage quoted in note 20, the superior court was not addressing the calculations made by one of plaintiffs' attorneys in an affidavit in an attempt to show that class carriers' fees paid per mile exceeded non-class carriers' fees paid per mile. Rather, it was addressing the predicate question to that analysis: whether mileage traveled was even relevant to such analysis. Based on unrefuted evidence, the superior court determined it was not. Therefore, the Washington Supreme Court was correct when it stated that the superior court "found there was no discrimination in fact." 136 Wn.2d at 748, 966 P.2d at 1238, Petition App. at 10a.

287 (1977), and *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987), both of which involved state taxes.[23]

However, Washington's motor vehicle regulatory program was funded by a "fee" not a "tax." Long ago, this Court articulated the distinction and held that the distinction is one of constitutional significance. *E.g.*, *Cooley v. Board of Wardens*, 12 How. (53 U.S.) 299, 314 (1851) (imposts and duties distinct from fees and charges for pilotage). In the *Head Money Cases*, 112 U.S. 580 (1884), this Court held that a fifty cent per passenger charge designed to defray the expense of regulating immigration was not a "tax" limited by the requirement of Article I, Section 8, of the Constitution requiring any tax to be "uniform" throughout the United States. This Court held that the levy was not a tax but "the mere incident of the regulation of commerce." *Id.* at 595.

The distinction between "taxes" and "fees" has been a comfortable one for this Court in a variety of modern contexts as well.[24] While the Petitioner attempts to question whether a principled line can be drawn between regulatory fees and general revenue measures, Petition at 17-18, there can be no doubt here that under any reasonable definition of a "regulatory fee" the fee at issue was one. The fee was in no sense a tax. All the proceeds of the fee were used for regulatory purposes. No fee payments were diverted to the general fund for general state purposes. If the fees generated revenues in excess of those needed for the regulatory program, the fee was adjusted downward to use any surplus in the fund. Petitioner seems concerned that the Washington

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[23] Indeed, Petitioner, after calling the assessment in question a "Regulatory Fee" in its complaint and throughout the briefing before the Washington Supreme Court, now elects to call it the "Washington tax." Petition at 2. We will continue to refer to the assessment as the "regulatory fee," accepting the term used by all parties below and by the Washington Supreme Court and which accurately describes the legal status of the assessment.

[24] *E.g.*, *United States v. United States Shoe Corp.*, 523 U.S. ___, 140 L.Ed.2d 453, 457 (1998); *United States v. Sperry Corp.*, 493 U.S. 52, 60-62 (1989); *Massachusetts v. United States*, 435 U.S. 444, 462 (1978); *National Cable Television Ass'n v. United States*, 415 U.S. 336, 341 (1974).

Supreme Court applied a "state-law" test to determine whether the fee was exempt from the federal requirement that taxes be "internally consistent." Petition at 18. However, application of "federal law" would reach the same result.

The question before this Court then is whether the Washington regulatory fee must meet the "internal consistency" test to be valid under the Commerce Clause when the fee fairly approximates the regulatory burdens on the state imposed by the carriers and does not discriminate against interstate commerce.

B. The Decision Below Is Consistent with Prior Decisions of This Court

This Court has long recognized the unremarkable proposition that, absent federal preemption, states may (1) regulate within their borders to protect the health and safety of their citizens, even if that regulation affects interstate commerce, and (2) assess a non-discriminatory fee to reimburse the state for the costs of that regulation.

For example this principle was articulated in *Great Northern Ry. Co. v. Washington*, 300 U.S. 154 (1937), in which this Court stated:

> "The supervision and regulation of the local structures and activities of a corporation engaged in interstate commerce, and the imposition of the reasonable expense thereof upon such corporation, is not a burden upon, or regulation of, interstate commerce in violation of the commerce clause of the Constitution." *Id.* at 160.

In *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), this Court invalidated a city ordinance which made it unlawful to sell milk which was not pasteurized within five miles of the center of the city. The Court concluded that the ordinance violated the Commerce Clause because there were "reasonable and adequate" alternatives available to the city to protect it from possible public health risks from milk pasteurized at distant locations, including those out-of-state.

> "If the City of Madison prefers to rely upon its own officials for inspection of distant milk sources, such inspection is readily open to it without hardship for *it could charge the actual and reasonable cost of such*

> *inspection to the importing producers and processors.*" *Id.* at 354-55 (emphasis added).

This Court historically has upheld such regulatory fees in a variety of contexts, rejecting challenges that they were invalid taxes and invalid under the Commerce Clause. *E.g.*, *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935) (state fee to defray cost of local safety regulation of harbor traffic); *Morgan's Louisiana and Texas Railroad & Steamship Co.*, 118 U.S. 455 (1886) (state inspection fee to enforce quarantine laws).

In *Sprout v. City of South Bend*, 277 U.S. 163 (1928), cited in *Dean Milk*, this Court described the general standards under which such a regulatory fee may stand.

> "[T]he state may impose, even upon vehicles using the highways exclusively in interstate commerce, non-discriminatory regulations for the purpose of insuring the public safety and convenience; that licensing or registration of busses is a measure appropriate to that end; and that a license fee no larger in amount than is reasonably required to defray the expense of administering the regulations may be demanded." *Id.* at 169.[25]

Petitioner would argue that this basic principle no longer is good law after *Scheiner*. It seeks to import the test of *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), into this case, relying on *Scheiner* and *Oklahoma Tax Comm'n v. Jefferson Lines*, 514 U.S. 174 (1995).

In *Complete Auto Transit v. Brady*, 430 U.S. 274, 287 (1977), this Court held that a tax on interstate activity is valid if: (1) there is nexus to tax the activity; (2) the tax does not discriminate against interstate commerce; (3) the tax is fairly apportioned; and (4) the tax is fairly related to the services provided by the taxing state. Here, Petitioner focuses on the

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[25] The *Sprout* Court invalidated the fee there at issue because "it [did] not appear that the license fee . . . in question was imposed as an incident of such a scheme of municipal regulation; nor that the proceeds were applied to defraying the expenses of such regulation; nor that the amount collected under the ordinance was no more than was reasonably required for such a purpose." 277 U.S. at 169. The fee at issue here has none of the defects of the fee invalidated in *Sprout*.

apportionment prong of this test.[26] Under that prong a tax is valid only if it is both "internally consistent" and "externally consistent." A tax is "internally consistent" if "imposition of a tax identical to the one in question by every other state would add no burden to interstate commerce that intrastate commerce would not also bear." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995). Petitioner focuses only on the internal consistency test.

Petitioner's reliance on *Scheiner* is misplaced for two reasons. First, given its factual context, *Scheiner* cannot be read to so revolutionize Commerce Clause limits on state regulatory authority. Not only did *Scheiner* involve taxes, not regulatory fees, but the central issue in *Scheiner* was one of discrimination, not apportionment. This Court stated the issue in *Scheiner* as "whether the methods by which the flat taxes are assessed discriminate against some participants in interstate commerce in a way that contradicts the central purpose of the commerce clause." 480 U.S. at 282. In *Scheiner*, unlike in this case, there was proof of such discrimination against one set of interstate carriers in favor of another.[27]

Second, post-*Scheiner* cases demonstrate that the distinction between taxes and fees survives. In the related context of airport user fees, the Court in *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355 (1994), reaffirmed the test for fees it had earlier approved in *Evansville-*

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[26] Before the superior court, the plaintiffs also contended that the regulatory fee did not pass the "fairly related" prong, *see* Petition App. at 34a, but failed in their effort to prove that claim. *Id.* at 39a. That issue was not pursued on appeal.

[27] In *Jefferson Lines* this Court so noted, stating "In *Scheiner*, we held that a flat tax on trucks for the privilege of using Pennsylvania's roads *discriminated* against interstate travel, by imposing a cost per mile upon out-of-state trucks far exceeding the cost per mile borne by local trucks that generally traveled more miles on Pennsylvania roads. 514 U.S. at 198 (emphasis added). The American Trucking Association (ATA) even presented the issue as one of discrimination in its briefs in *Scheiner*. Brief for Appellant at (i), *American Trucking Ass'ns v. Scheiner*, *see also* Jurisdictional Statement at (i).

Vanderburgh Airport Auth. Dist. v. Delta Airlines, 405 U.S. 707 (1972), stating

> "[A] levy is reasonable under *Evansville* if it (1) is based on some fair approximation of use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce." 510 U.S. at 369.

See also United States v. Sperry Corp., 493 U.S. 52 (1989) (fee to compensate government for costs incurred in connection with Iran-United States claims tribunal).

Oklahoma Tax Comm'n v. Jefferson Lines, 514 U.S. 175 (1995), involved a tax on the sale of a ticket for interstate bus travel. In that case, the Court declined the invitation to apportion the tax because the incidence of the tax, the sale, was an intrastate activity. Rejecting a claim that the tax should be apportioned on the basis of miles traveled, the Court stated that "miles traveled within the State simply are not a relevant proxy for the benefit conferred upon the parties to a sales transaction." 514 U.S. at 199. Likewise, here, as the lower courts found, mileage is not a relevant proxy for the burden of regulation imposed on the state by interstate carriers. No error was assigned to this finding.

We do not suggest that states may employ regulatory fees to circumvent protections afforded to interstate businesses under the Commerce Clause. The cited cases state ample protections. In *Sprout*, this Court stated that such fees may be "no larger in amount than is reasonably required to defray the expense of administering the regulations." 277 U.S. at 169. *See also Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981).[28] Put another way, a state

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[28] In *Commonwealth Edison*, the Court upheld a Montana coal severance tax against a claim that the tax was so high that it did not approximate compensation to the state for the burden placed on the state. The Court distinguished *Evansville-Vanderburgh Airport Auth. District v. Delta Airlines*, 405 U.S 707 (1972), noting that the fees at issue in *Evansville* "cannot be tested by standards which generally determine the validity of taxes." 453 U.S. at 621-22. The Court stated:

> "Because such charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services,

may not "appropriate[]" the proceeds to itself "and label[] the booty as a user fee." *See United States v. Sperry Corp.*, 493 U.S. at 62. And, of course, the fee, in conjunction with the regulatory program, may not be structured so as to discriminate against interstate commerce.

Here, those constitutional requirements are met. The fee is not discriminatory and is fairly related to the burdens placed on the state. Indeed, any concern about whether the fee is fairly related to the burdens placed on the state is eliminated by the fact that there are alternatives to the per-vehicle fee. Single trip permits and "floater cards" provide a less expensive alternative to interstate carriers providing limited services within Washington.[29]

Petitioner's concerns about the alleged commercial chaos that would ensue if multiple states were to impose fees similar to the now-repealed Washington fee are unfounded. To make its point, Petitioner relies on a hypothetical posed by dissenting Justice Sanders in the court below. Petition at 15, n.11. Justice Sanders pointed out that an interstate carrier traveling from Boston to Seattle would have to pass through at least 11 states, potentially subjecting itself to 11 separate fees. Comparing that carrier with an intrastate carrier traveling from Seattle to Spokane, he concluded that the intrastate carrier would have a "competitive advantage" over the interstate carrier. Putting aside the reality that the Boston to Seattle carrier is not in competition with the Seattle to Spokane carrier because they are in different markets, the simple response to Justice Sanders and the Petitioner is that each of those states has a right to protect its citizens from

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we have required a showing based on factual evidence in the record, that 'the fees charged do not appear to be manifestly disproportionate to the services rendered . . . .'" 453 U.S. at 622, n.12.

[29] At least two lower courts have indicated that such alternatives are relevant in such constitutional determinations. *See Trailer Marine Transport Corp. v. Rivera Vazquez*, 977 F.2d 1, 12 (1st Cir. 1992) (opining that allowing a transfer of a permit from vehicle to vehicle would provide a "rough equivalence" between interstate and intrastate carriers); *Aloha Freightways, Inc. v. Commissioner of Revenue*, 428 Mass. 418, 701 N.E.2d 961, 967-68 (1998) (exemption from tax for carriers making de minimis contact with state).

unsafe trucks and inspect the trucks on the way through so long as its regulation is not discriminatory and does not place an undue burden on interstate commerce. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Further, each state can collect from the interstate carrier the reasonable costs of that regulation.[30]

This might mean that the carrier traveling from Boston to Seattle may have to pay various fees while the carrier from Seattle to Spokane would pay only one. However, the interstate carrier also may be subjected to multiple inspections along the way whereas the intrastate carrier may be subject to only one. The incidental burdens of multiple inspections, like the incidental burdens of multiple fees, does not run afoul of the Commerce Clause so long as those burdens are not "clearly excessive." 136 Wn.2d at 754, 966 P.2d at 1241, *citing Pike v. Bruce Church, Inc.*, 397 U.S. at 142, Petition App. at 16a.

Indeed, under Petitioner's theory, legitimate and long-standing state licensing and regulatory programs could be hampered. This case arises in the context of a now repealed motor carrier regulatory fee. Application of Petitioner's theory to this repealed fee could implicate any state license system designed to protect the public. For example, business registration fees, hunting or fishing license fees, and bar license fees for attorneys would be invalidated by application of the "internal consistency" test as under Petitioner's theory. An attorney practicing law in Washington and Oregon could argue that Washington's flat, per attorney, bar dues must be apportioned, perhaps on a revenue basis. A traveler vacationing in Montana could argue that a hunting or fishing license should be apportioned based on days of use. A multistate business, faced with a registration fee for state revenue reporting purposes or workers compensation

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[30]Of course, if Congress were to have viewed the imposition of per vehicle regulatory fees by multiple states (either actual or hypothetical) as a threat to interstate commerce, it could have intervened. Indeed, in a number of areas involving interstate commerce, Congress has preempted state authority over state taxes. *E.g.*, 49 U.S.C. §§ 14502, 40116. But Congress took advantage of none of those opportunities to find and declare state regulatory fees contrary to any federal interest.

administration, would argue that such fees should be reduced because it is subject to such burdens (and perhaps differing ones) in multiple states, while its in-state competitors must deal with only one government regulator. Each of these legitimate regulatory fees is plainly valid. There is no reason to place each of them in jeopardy by importing Petitioner's tax analysis into this Court's examination of regulatory fees.

The policy permitting states to collect costs of regulation from interstate businesses reflected in various past decisions of this Court is a sound one. The test suggested in *Sprout*, *Commonwealth Edison*, *Evansville*, *Northwest Airlines*, and many other cases would allow regulatory fees only if they (1) do not discriminate against interstate commerce, (2) are used only for regulation, and (3) are reasonably related to the cost of regulation. That test is fully satisfied here.

To hold that a non-discriminatory fee, that is fairly related to the services performed, must nevertheless be apportioned would mean that apportionment would be required even if both the class and non-class carriers paid 100 percent of the costs of regulation attributable to them. In that case, the result of reducing the fees on interstate carriers would mean that such reduction would have to be made up elsewhere. This would lead to the intrastate carriers paying more than 100 percent of the share attributable to them. Under the Petitioner's theory in this case, interstate commerce would not have to "pay its way." *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 281 (1977). Indeed, it would be the intrastate carriers, not the interstate carriers who would be subjected to a "double whammy." Petition at 16-17. The intrastate carriers would have to pay for the reasonable costs of their own regulation as well as a portion of the costs imposed by the interstate carriers and still be subject to the same regulatory burdens as those interstate carriers. This is not what the constitution does or should require.

In sum, the opinion below is consistent with existing negative Commerce Clause doctrine and should not be disturbed.

C. The Decision Below Is Consistent with the Great Majority of Lower Court Decisions

The Petitioner suggests that lower federal appellate courts and state supreme courts are in conflict on whether a regulatory fee must be apportioned pursuant to the "internal consistency" test. Petition at 19-23. The Petitioner cites only three cases supporting its view[31] and three cases (not including the instant one under review) supporting the state's position.[32] However, the alleged split in lower court authority is not quite as severe as the Petitioner suggests. Not only is there more authority supporting the proposition that a regulatory fee need not be apportioned,[33] but not all cases cited in support of the Petitioner's position are apposite.

While the Supreme Judicial Council of Maine did invalidate a flat, annual "hazardous material fee," only 10 percent of that fee was dedicated for inspection or other regulatory purposes. Much of the rest went to a "hazardous waste fund." *American Trucking Ass'ns, Inc. v. Secretary of State*, 595 A.2d 1014, 1015 (Me. 1991).[34] Here, 100 percent

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[31] *Government Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992), *cert. denied*, 506 U.S. 1053 (1993); *American Trucking Ass'ns, Inc. v. Secretary of Administration*, 613 N.E.2d 95 (Mass. 1993); *American Trucking Assn's, Inc. v. Secretary of State*, 595 A.2d 1014 (Me. 1991). The Petitioner also cites a number of cases invalidating various types of *Scheiner*-type taxes. Petition at 22, n. 16.

[32] *V-1 Oil Co. v. Utah State Dept. of Pub. Safety*, 131 F.3d 1414 (10th Cir. 1997); *Interstate Towing Ass'n v. Cincinnati*, 6 F.3d 1154 (6th Cir. 1993); *Department of Banking & Finance v. Credicorp, Inc.*, 684 So.2d 746, 752 (Fla. 1996).

[33] *E.g., Center for Auto Safety, Inc. v. Athey*, 37 F.3d 139 (4th Cir. 1994) ("user fee" analysis under *Evansville* applied to fee used to defray costs of charity registration program); *Seibert v. Clark*, 619 A.2d 1108, 1113-17 (R.I. 1993) (flat $10 per vehicle "fuel decal" fee upheld against apportionment and discrimination charges).

[34] The Maine case is also distinguishable in two other ways. First, the court there used a mileage analysis which the state could not rebut. Second, as to whether there was a practicable alternative to the tax, the state offered only a modicum of evidence, that being simply an

of the fee was so dedicated. And though the Supreme Judicial Council of Massachusetts did invalidate a per-vehicle charge, it did so based on the conclusion that on a class basis "local trucks derive far greater economic benefit from each of the challenged fees paid than do interstate trucks." *American Trucking Ass'ns, Inc. v. Secretary of Administration*, 613 N.E.2d 95, 101 (Mass. 1993). Here, that is not the case. Moreover, recently, in *Aloha Freightways, Inc. v. Commissioner of Revenue*, 428 Mass. 418, 701 N.E.2d 961 (1998), the Massachusetts court distinguished *Secretary of Administration* and *Scheiner* because in those cases there was no provision for a lower fee for carriers making de minimis contact with the state. Like Washington's regulatory fee, which allowed for single trip permits and other options for interstate carriers, the Massachusetts tax at issue in *Aloha* gave a break to carriers having minimal operations in the state. 701 N.E.2d at 968.

That leaves the single case of *Government Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992), *cert. denied*, 506 U.S. 1053 (1993), as arguably in conflict with the opinion below. Though that case contains language supporting Petitioner's argument, it too is distinguishable. The annual registration fee at issue was "part and parcel" of a ban on vehicles used to transport solid wastes from "backhauling" certain other commodities. The court declared the "backhaul ban" unconstitutional as an undue burden on interstate commerce. *Id.* at 1281. Though the court continued its analysis, finding problems under

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assertion in an affidavit which the court did not find to be adequate evidence. 595 A.2d at 1018. Here, plaintiffs failed to show mileage was an appropriate proxy nor did they rebut the state's evidence of the lack of alternatives to the fee. The other hazardous materials transportation fee case cited by Petitioner that arguably supports an apportionment analysis is likewise distinguishable. The fee involved in *American Trucking Ass'ns, Inc. v. Wisconsin*, 205 Wis.2d 489, 556 N.W.2d 761 (Wis. App.), *rev. denied*, 207 Wis.2d 287, 560 N.W.2d 274 (1996), was used only for emergency response, not for regulatory purposes. The case also is distinguishable in that the state in effect admitted there was a practicable alternative to the fee. *Id.* at 768.

Scheiner, that analysis was not necessary to its ultimate holding.[35]

So, at most, only the *Bayh* case stands in contrast to the decision below, and that case is distinguishable. This is hardly the sort of conflict in the lower courts that cries out for resolution by this Court, particularly since the statute in question was repealed six years ago. If the current litigation pending in state courts regarding the validity of per-vehicle fees on transporters of hazardous materials result in a conflict, Petition at 27, n.23, then perhaps review by this Court will be warranted at some future time. But for now, the issue regarding fees on motor carriers is not one that has divided lower courts and does not merit this Court's attention.

D. The Constitutional Issue Raised by the Now Repealed Washington Regulatory Fee Is Not So Significant as to Warrant Review in this Case

Petitioner makes four points in its argument that the issue raised in this case is an "important and recurring one." Petition at 23-28. None of its points is valid.

First, Petitioner raises the specter of states continuing to impose "flat taxes" on interstate carriers and cites a number of state statutes which impose per-vehicle or per-carrier fees on transporters of hazardous materials. The cited fees appear to be of varying types,[36] and, by their description, not all appear to be used exclusively for regulatory purposes.[37] Just how review of this case would assist in providing guidance to other courts considering such fees on

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[35] The court also indicated that the problem with the fee was that it affected the small, casual hauler more than it affected the large, frequent hauler. Following the analysis of the Massachusetts court in the recent *Aloha Freightways* decision, the single trip permit and other options in the Washington fee address this concern.

[36] Included in the list provided by the Petitioner are "permit," "processing," "transporter," "administrative," and "monitoring" fees. Petition at 24-25, n.17.

[37] *See* Petition at 25, n.18, *citing* N.Y. ECL § 72-0201(11)(b) (one-half of revenues used for "purposes of carrying out the provisions of this chapter").

transporters of hazardous materials is unclear. Indeed, in the one cited case involving American Trucking Associations, Petition at 27, n. 23, the plaintiffs there presented evidence of actual discrimination, just as they did in *Scheiner,*[38] proof which plaintiffs here contend is not necessary. Further, while state concerns with motor carrier safety are significant, transportation of hazardous materials may trigger different concerns and a different federal statutory overlay.[39]

Second, Petitioner suggests that the Washington Court will "foment continuing litigation" about the validity of "unapportioned taxes." The state doubts that the Washington decision will lead to more litigation over "taxes." *Scheiner* and its progeny have resolved those issues. Litigation over motor carrier regulatory fees, like the repealed fee at issue here, is also not likely given the federal base state program which made continuation of Washington's fee system administratively difficult.[40] To the extent that Petitioner is concerned about state hazardous waste transporter fees, there already is litigation on that front and, according to Petitioner, Petition at 24, n.17, there are ample statutes over which to litigate.

Third, Petitioner expresses sympathy for state legislators who may not know whether to repeal regulatory fees or enact them, and may unwittingly subject their states to substantial refund liability, citing *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). However, pursuant to this Court's direction in *McKesson*, such legislators can protect their states adequately

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[38] *American Trucking Ass'ns, Inc. v. State of New Jersey*, No. A-0006334-97T3F (N.J. Super. Ct. App. Div.) (ATA Br. at 45-64, basing discrimination argument on dollars paid per manifest). One of the counsel for the Petitioner in this appeal is among the counsel for the ATA in the New Jersey case.

[39] *Eg.*, in *American Trucking Ass'ns, Inc. v. State of New Jersey*, No. A-0006334-97T3F (N.J. Super. Ct. App. Div.), the state appellants argue that the Hazardous Materials Transportation Uniform Safety Act, 49 U.S.C.A. App. 1801 *et seq.*, gives states authority to impose transporter fees. Br. of State of New Jersey at 37-43.

[40] See note 1.

from such refund obligations. *Id.* at 45 (referring to a variety of means including "relatively short" statutes of limitations).

Finally, Petitioner reminds the Court that, despite the repeal of this fee in 1993, the constitutional issue here is not moot because the class of carriers the Petitioner and its co-plaintiff represented below sought refunds. However, even assuming Petitioner were to prevail on the merits of its claim in this Court, there would remain substantial legal and factual questions which would have to be resolved before the 95 percent of the carriers in the plaintiff class could claim refunds. First, even assuming *Scheiner* applies, there would be the issue of whether the per-vehicle fee and its administrative alternatives were the only "practicable means" to collect the costs of regulation and whether a "more finely gradated user fee schedule would pose genuine administrative burdens." 483 U.S. at 296.[41] As was the case with the evidence on the relevance of mileage as a proxy, the state presented evidence as to why mileage-based or revenue-based allocation method was not "practicable." As with the evidence on whether mileage is a proxy for the burden on the state, this evidence went unrebutted.[42]

Further, as the superior court held, Petition App. at 38a, plaintiffs would not be entitled to a refund in any event. Even assuming the fees are subject to the same procedural due process analysis as are taxes, the predeprivation remedy of injunction was available to the plaintiffs. Petition App. at 39a; *see McKesson Corp. v. Division of Alcholic Beverages & Tobacco*, 496 U.S. 18, 36-37 (1990).

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[41] This Court in *Scheiner* stated, after rejecting precedents for flat taxes:

> "Those precedents are still valid, however, in their recognition that the Commerce Clause does not require the states to avoid flat taxes when they are the only practicable means of collecting revenues from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens." 483 U.S. at 296 (footnote omitted).

[42] *See* Br. of Respondents and Cross-Appellants at 26.

CONCLUSION

For the reasons stated above, the Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

81.80.318 Any motor carrier engaged in this state in the casual or occasional carriage of property in interstate or foreign commerce, who would otherwise be subject to all of the requirements of this chapter, shall be authorized to engage in such casual or occasional carriage, upon securing from the commission a single trip transit permit, valid for a period not exceeding ten days, which shall authorize a one way trip in transporting property for compensation between points in the state of Washington and points in other states, territories, or foreign countries.

No identification cab cards and decals or stamps or numbers and no regulatory fees other than as provided in this section shall be required for such permit. The permit must be carried in the cab of the motive power vehicle.

The permit shall be issued upon application to the commission or any of its duly authorized agents upon payment of a fee of ten dollars and the furnishing of proof of possession of public liability and property damage insurance in limits of at least twenty-five thousand dollars, for injury or death of any one person, and subject to such limit as to any one person, for one hundred thousand dollars for injury or death of all persons caused by any one accident and for ten thousand dollars for all damages to property caused by one accident. Such proof may consist of an insurance policy or a certificate of insurance.

The commission shall not be required to collect the excise tax prescribed by RCW 82.44.020 on any vehicle subject only to the payment of this fee.

81.80.320 In addition to all other fees to be paid by him, every "common carrier" and "contract carrier" shall pay to the commission each year prior to receiving his identification decal or stamp or number for each motive power vehicle operated by him, based upon the maximum gross weight thereof as set by the carrier in his application for his regular license plates, plus any additional tonnage or log tolerance permits, the following fees:

Less than 4,000 pounds..... $ 7.00

. . .

72,000 pounds or more and less than 76,000 pounds..... 48.00

In the event that trailers or semitrailers are separately licensed for gross weight and not included within the licensed gross weight of the motive power vehicle as prescribed above, the fees provided herein shall be computed on the basis of the licensed gross weight of the trailer or semitrailer, plus any additional tonnage or log tolerance, and a separate identification cab card will be issued in the same manner as for a motive power vehicle under RCW 81.80.300.

It is the intent of the legislature that the fees collected under the provisions of this chapter shall reasonably approximate the cost of supervising and regulating motor carriers subject thereto, and to that end the utilities and transportation commission is authorized to decrease the schedule of fees provided in this section by general order entered before November 1st of any year in which it determines that the moneys then in motor carrier account of the public service revolving fund and the fees currently to be paid will exceed the reasonable cost of supervising and regulating such carriers during the next succeeding calendar year. Whenever the cost accounting records of the commission indicate that the schedule of fees as previously reduced should be increased such increase, not in any event to exceed the schedule set forth in this section, may be effected by a similar general order entered before November 1st. Any decrease or increase of gross weight fees as herein authorized, shall be made on a proportional basis as applied to the various classifications of equipment.

All fees collected under this section or under any other provision of this chapter shall be paid to the commission and shall be by it transmitted to the state treasurer within thirty days to be deposited to the credit of the public service revolving fund.

WAC 480-12-130(3)

(3) The stamp fee named in subsection (2) applies to each stamp applied for. The regulatory fee is also payable in connection with each stamp and is determined as follows:

. . .

(b) In lieu of the payment of a full regulatory fee for each vehicle or combination of vehicles operated across or between points in the state and points outside the state exclusively in interstate or foreign commerce, and as to vehicles operated between points in this state and points outside the state in interstate commerce as well as points within this state in intrastate commerce, the regulatory fee may, at the request of the carrier, be paid on the basis of one of the following options:

Option 1. Floater regulatory fee cards.

Carriers who operate vehicles between points in this state and points outside this state exclusively in interstate commerce, and carriers who operate fleets in excess of 200 motive power units between points in this state and points outside this state interstate commerce as well as points within this state in intrastate commerce may elect to purchase unassigned regulatory fee receipts at one hundred fifth percent of the applicable gross weight fee stated in subsection (2). One of these regulatory fee receipts must be carried within the cab of the motive power vehicle when such equipment is operate din this state and must be accompanied by a properly executed National Association of Regulatory Utility Commissioners uniform identification cab card and Washington utilities and transportation commission identification stamp. When applied for in this manner the fee must be that for the highest gross licensed weight of such solo or combination with which the receipt showing the payment of regulatory fees may be used.

The carrier must purchase for three dollars an identification stamp for each power unit.

In the case of unladen automobiles and trucks operated in interstate driveaway service across or between points in the state and points outside the state, the carrier may use unassigned Nationa! Association of Regulatory Utility Commissioners uniform identification cab cards and

Washington utilities and transportation commission identification tamps upon payment of one hundred fifty percent of the applicable gross weight fee and the three dollar stamp fee for each unassigned cab card and stamp.

Option 2. Lump sum regulatory fee payments.

Carriers who operate fleets in excess of 200 motive power vehicles either exclusively in interstate or foreign commerce across or between points in this state and points outside this state or between points in this state and points outside this state in interstate commerce as well as points within this state in intrastate commerce, and who have so operated under Option 1, above, or this option for the immediately preceding calendar year, may elect to pay a lump sum regulatory fee based on the number of power units for which identification stamps have been purchased during the immediately preceding calendar year at the regulatory fee established by general order of the commission entered before October 1st of any year. These carriers must purchase a three dollar identification stamp for each power unit. With a properly executed National Association of Regulatory Utility Commissioners uniform identification cab card and Washington utilities and transportation commission identification stamp attached, no proof of regulatory fee payment need be carried.

Option 3. Single trip transit permit.

Carriers engaged exclusively in casual or occasional interstate or foreign commerce across or between points in the state and points outside the state may as in alternative to all other requirements of this chapter obtain a single trip transit permit, valid for ten days, authorizing a one-way trip into, out of or across the state. This permit will be issued upon payment of a fee of ten dollars and must be carried in the cab of the power vehicle. The carrier must state the name and policy number or binder of the insurance company with whom the carrier has insurance which meets the provisions of WAC 480-12-350.

Option 4. Single trip regulatory fee card.

A carrier registered with the Washington utilities and transportation commission to engage in interstate or foreign commerce across or between points in this state and points

outside of this state, may purchase single trip regulatory fee cards, valid for seventy-two hours, authorizing a trip into, out of or across this state, for a fee of ten dollars each.

Prenumbered single trip regulatory fee cards must be purchased at any commission office or port of entry, or from an authorized commission field agent. The card must be carried in the power unit.

(c) In intrastate or interstate commerce between points within the state of Washington the identification cab card and stamp may, at the request of the carrier, not be assigned to any particular motive power vehicle under the following circumstances:

(i) In connection with trucks or tractors to be operated under master leasing agreements provided for in WAC480-12-210(1)(h), in which case the cab card may be used only with vehicles operated under such master leasing agreements; and

(ii) In connection with unladen automobiles or trucks in driveaway service, in which case the cab card may be used only with such vehicles in driveaway service. The fees shall be as stated in subsection (3)(a) for the highest gross licensed weight (highest actual weight in driveaway service) on any power vehicle with which the identification cab card and stamp may be used.

(d) In intrastate commerce between points within the state of Washington, a common or contract carrier acquiring the use of private carrier equipment under the provisions of WAC 480-12-210(1)(c) may, in connection with short term leases, elect to purchase single trip regulatory fee cards, valid for seventy-two hours, authorizing a one-way trip between points within this state, for a fee of ten dollars each, in lieu of payment of the full regulatory fee.

Prenumbered single trip regulatory fee cards must be purchased in advance and no refunds will be allowed for unused cards. Cards must be filled out, in ink or by typewriter, by the carrier, showing the description of the vehicle, license number, state in which the vehicle is licensed, name of owner, the commodity to be transported, the origin and destination of the shipment and be signed by an officer, agent or employee of the carrier authorized to use

the card. The card must be carried in the power unit. The vehicle operating under a single trip regulatory fee shall be under the control and direction of the motor carrier issuing the card and shall be used only within the scope of the authority of that motor carrier.

At the end of each calendar month a report shall be sent to the commission, showing the card number, date used, original of shipment, destination of shipment and vehicle number.

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

FRANKS & SON, INC., et al., Plaintiffs, v. STATE OF WASHINGTON; WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, et al., Defendants.	NO. 90-2-00495-1 DECLARATION OF LARRY A. PURSLEY

I, LARRY A. PURSLEY, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I have personal knowledge of the matters contained in this declaration and am competent to testify on such matters.

2. I am the Executive Vice President of the Washington Trucking Associations (WTA). WTA is an organization composed of approximately 1200 member firms, consisting of truckload, less-than-truckload (LTL), bulk, heavy haul, log truck, dump truck, household goods, and other motor carriers as well as suppliers to the trucking industry. Member carriers transport goods in interstate, intrastate, and foreign commerce.

3. The purpose of the WTA is set forth in its constitution as amended December 5, 1990. The relevant portion states as follows:

> The objects of this Association are for the purposes of bringing closer together all operators of motor vehicles engaged in the transportation of property in both intrastate and interstate commerce in the State of Washington authorized to transport property by motor vehicle by reason of permits issued

to them by the State of Washington, and in some cases, by reason of certificates or permits issued to them by the Interstate Commerce Commission, Bureau of Motor Carriers, and also engaged in the transportation of property by motor vehicle in connection with their own private operation; and in order that the service to the public may be improved, the cost of operation lessened and the rights of the respective operators protected.

It shall also be the object of the Association to further the advancement of the interests of transporters of property by motor vehicle; the education of those engaged in such transportation on matters affecting the operation of motor vehicles including safety facilities, safety devices, and laws governing such operations; to affiliate with or to establish reciprocal relations with any other association, commercial or industrial, and with the American Trucking Associations, Inc.; and to participate by election of directors of the American Trucking Associations, Inc. and in the activities of such Association nationally; to act as the medium for the expression of views of its members on matters affecting the interests of those engaged in the transportation of property; to foster and advance safety on the public roads and highways; and to do such things as may be proper to create and stimulate a fair and intelligent attitude on the part of the public with respect to the transportation business of its members and to accomplish fair and intelligent legislation with respect thereto; to promote and foster the business of its members and distribute to such members and the pubic accurate and reliable information on matters of transportation; to do everything possible to remove abuses from the business of transportation; and to promote harmony among the members of this Association.

4. I have served as Executive Vice President of the WTA since 1991. Prior to serving as Executive Vice President, I served in the WTA in a variety of capacities since 1976.

5. In the course of that employment, I have developed extensive personal knowledge of all facets of the motor carrier industry, both as it operates intrastate and interstate. I also am very familiar with the Washington Utilities and Transportation Commission (Commission) and its regulatory operations, including the administrative of the regulatory fee which is the subject of this litigation and which was repealed effective January 1, 1994.

6. Through conversations with Commission staff and administrators, and with counsel for the WTA, I am familiar generally with the subject in the above-captioned litigation. The WTA filed an amicus brief in support of the Commission's initial motion for summary judgment. The Executive Committee of the WTA decided to file that brief opposing the relief sought by the plaintiffs. We argued in that brief that 'the WUTC's regulatory fee [was] not unconstitutionally discriminatory against interstate commerce, nor [was] it preempted by the Interstate Commerce Act.'

7. As I understand this case, the plaintiff class consists of those carriers which operate in whole or in part in interstate commerce. Non-class members consist only of those carriers who operate exclusively in intrastate commerce. The WTA membership consists of both class and non-class members.

8. There are substantial differences between the class and non-class carriers. These include the following:

a. First, there is difference between the class and non-class relating to the types of loads they carry. Carriers operating purely interstate are predominantly 'truckload' carriers. That means that they carry one shipment per truckload (as opposed to LTL which consists of several shipments per truck on behalf of a variety of shippers). Truckload carriers generally travel into this state using major highways to a single destination and drop off their truckload. They may or may not pick up another truckload shipment and carry that out-of-state, again without making any further stops. Such truckload carriers do not 'distribute' goods to a variety of destinations on behalf of number of different shippers.

In contrast, LTL haulers, and proportionately many more members of the non-class, are local delivery carriers. These carriers transport goods from a central drop-off point, such as a warehouse, to a number of delivery points within the area.

Further, there are certain types of trucks which travel almost exclusively intrastate (though the goods they carry may actually travel interstate). One example of these is log trucks which carry logs on relatively short hauls from the woods (frequently off-road) to a processing facility or to a port facility for export. Many of these trucks in addition to traveling limited distances are only operated during limited times of the year, perhaps as few as thirty days. Other carriers serving the wood products industry, such as those carrying wood chips also would tend only to be intrastate vehicles. Other such types would be dump truck operators, sand and gravel haulers, and small parcel delivery vehicles or couriers. All these generally travel within a confined area, travel limited mileage, and make frequent stops.

b. Second, there is a difference between the class and non-class carriers relating to aggregate number of miles travelled per vehicle. A typical truckload hauler may travel well over 100,000 miles per year, usually over major highways. Because drivers of truckload carriers generally get paid by the mile travelled, there is an economic incentive to travel more miles. In contrast, an LTL carrier or other non-class member would generally travel shorter distances and make a number (sometimes frequent) of stops or deliveries in a given day. Therefore, the average per vehicle number of miles travelled by such a carrier would be less than the interstate carrier. So, for example, a pure interstate vehicle which transports goods regularly from San Francisco to Seattle may travel over 100,000 miles per year, 20,000 of which may be within Washington, while an LTL carrier or other delivery vehicle may travel only 20,000 in total, all within Washington.

c. Third, there is a difference as to routes traveled. Truckload (class member) carriers generally travel over interstate and other large state highways. Non-class members are significantly more likely to travel over

secondary highways into every nook and cranny of the state and around city streets in small towns and urban areas.

d. Fourth, because truckload carriers generally transport goods over long distances, there are significant safety concerns posed by class carriers that are less of a problem with non-class carriers. As stated above, a typical interstate truck may travel well over 100,000 miles per year, usually on major federal or state highways. Such a vehicle, assuming it is based outside Washington, frequently is away from its base for two to three weeks at a time. The driver generally is paid on a mileage basis. These facts have two significant ramifications for safety. First the longer the vehicle is away from home, the greater chance that the vehicle will need maintenance or servicing. Second, because there is an economic incentive for drivers of such interstate haulers to driver longer hours, there is an increased concern about hours of service violations. In contrast, a pure intrastate vehicle usually is back at its terminal each night, closer to its own maintenance facilities. Further, drivers of such trucks generally are not paid on a purely mileage basis, so there is less concern for hours of service violations.

e. Fifth, there are significant differences in the regulatory burdens placed on the state by the two classes of vehicles. These are in addition to the added burdens discussed in my fourth point above. Interstate vehicles impose burdens at the ports of entry which are not shared by non-class carriers. Intrastate vehicles based in-state can be inspected easily at terminals. Interstate carriers based out-of-state are more difficult to reach for purposes of inspection. Therefore, it is necessary to conduct elaborate roadside inspections, usually on major highways, in order to cover the interstate, non-Washington based carrier, to adequately the public from safety violations.

9. Intrastate carriers also make a greater contribution to general state revenues than those interstate carriers with no place of business in Washington. The State of Washington imposes a public utility tax on gross revenues of carriers intrastate operations. The statute exempts revenues from all interstate operations. Therefore, a carrier transporting goods from Portland, Oregon, to Spokane, pays no public utility tax on its revenues, while a carrier

transporting the same load from Vancouver, Washington, to Spokane, would pay such tax on revenue from this intrastate operation.

Further, if the carrier is based in Washington, it also will pay local taxes and business license fees in each city in which it has terminal facilities. In short, intrastate carriers carry more than their burden of providing funds to the state general fund and to local governments compared to interstate carriers which provide almost no such revenues, even though interstate carriers require state police and fire protection and also benefit from many other government services.

10. Prior to the repeal of the regulatory fee system at issue in this litigation, the Commission offered a variety of administrative options to carriers which transport goods in interstate commerce. These include floater cards, single trip regulatory fee cards, single trip permits, and lump sum regulatory fees. These were beneficial to those interstate carriers which did not have a predictability of operations which would result in their vehicles being present in Washington a significant portion of the time.

The single trip permit and single trip regulatory fee card options allow carriers to forego paying the annual regulatory fee and instead purchase such a permit or fee card at the border. Such a purchase is not administratively inconvenient because the carrier has to stop anyway. Many carriers take advantage of such an option.

Floater cards are useful particularly for those truckload carriers operating on a fixed route (say, for example, Los Angeles to Seattle). The carrier may have hundreds of vehicles in its fleet, but it may not know which of the vehicles would be designated to carry a load from Los Angeles to Seattle. Therefore, the carrier could purchase a number of floater cards and keep them in Los Angeles. When a truck is dispatched to Seattle, the dispatcher simply provides the driver with the floater card, which is returned when the truck returns to Los Angeles for use by the next truck heading north. Should the carrier run short of such floater cards, the driver of the vehicle would have the option of purchasing a single trip regulatory fee card at the border or, if it believes that the vehicle would be entering the state frequently, it could pay a full regulatory fee.

11. The WTA and its members have never considered the now repealed regulatory fee on carriers to be a burden on carriers. The WTA and member carriers always have believed that the interests of the motor carrier industry are best served by a solid safety enforcement program in this state. Carriers frequently operate on small profit margins, so there can be incentives to avoid or defer appropriate maintenance on vehicles. A good, solid safety program which insures compliance with state and federal rules and regulations is essential to a level competitive playing field in the motor carrier industry and ensure safe highways for all Washington citizens. The State of Washington has had one of the better safety records in the nation due, in part, to solid inspection program by the WUTC. The regulatory fee challenged in this litigation funded those efforts.

DATED and SIGNED this [16th] day of May, at Federal Way, Washington.

/s/
LARRY A. PURSLEY